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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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Federal Communications Commission
Office of Secretary

In the Matter of	)	
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Petition of MCI for Declaratory Ruling	)	CC Docket No. 96-98 CCBPol 97-4

COMMENTS OF AT&T CORP.

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SUMMARY

This proceeding was initiated to address the efforts by some incumbent local exchange carriers ("ILECs") to deny their competitors access to unbundled network elements on the ground that to grant such access would allegedly violate the intellectual property rights of third parties. These ILECs are demanding that their competitors first negotiate separate licenses from each of the dozens of vendors whose rights, the ILECs claim, would be implicated. Both the likely intent and the certain effect of the assertion of such claims is to erect a substantial barrier to the efforts of new entrants to provide competitive local service through unbundled network elements.

This issue has already been effectively resolved by the principles and rules adopted in the First Report and Order. The First Report and Order establishes that the availability of each of the designated network elements is necessary to the development of local exchange competition, that incumbent LECs are obligated to provide CLECs with the same quality of access to those elements as they provide to themselves, and that where such nondiscriminatory access will require modifications to existing arrangements, the incumbent LECs must make such modifications. Accordingly, insofar as any LEC genuinely believes its existing contracts preclude it from providing nondiscriminatory access to network elements, it must use its superior bargaining position with its third party vendors -- a function of its unique economies of scale -- and its superior access to relevant information to renegotiate those contracts. This duty is compelled by Section 251 of the Act, and

any effort by a State to excuse an incumbent LEC from compliance would violate its obligations under section 252(c).

Further, a State order requiring each CLEC to obtain its own separate licenses from each of the LECs' many vendors would violate section 253 of the Act, and the FCC should declare any such requirement preempted. Such an order would impose costs on new entrants substantially greater than those incumbents would and had to bear -- the classic definition of a barrier to entry. First, CLECs would incur significant transaction costs in attempting to obtain licenses from dozens of different vendors as a precondition of entry. Second, CLECs would also then pay higher unit costs for the licenses themselves, because they lack the bargaining position of the ILECs. Indeed, the ILECs that have been pressing these intellectual property claims most vigorously are seeking to make CLECs pay <u>twice</u> -- once as part of the price of the unbundled elements that the CLECs purchase from the ILEC (in which the ILECs include their own licensing costs) and again in the licensing fees they would directly pay the LECs' vendors. The significant cost disadvantage this would impose on CLECs as compared to the incumbents would certainly discourage at least some from entering the market at all.

AT&T believes that reaffirming these duties of the LECs under Section 251 and the States under Section 253 is not only necessary but fully sufficient to resolve the issue presented here -- regardless of whether there are many, few, or no such instances in which intellectual property rights are genuinely implicated. In any event, however, there is ground for great skepticism regarding the LECs' claim that there is any substantial potential for violations of intellectual property rights. As the LECs' brief in their appeal of the First Report and Order unwittingly revealed, those claims are based on a blatant mischaracterization of what access to unbundled network elements entails. Moreover, these LECs have provided in the past, and continue to provide today, access to their facilities in which other carriers receive rights materially indistinguishable from the rights those carriers will receive as purchasers of unbundled network elements. Until those carriers became the LECs' local service competitors, the LECs had never asserted claims of potential intellectual property rights violations. This underscores that the surest way to eliminate the contrived use of such claims is for the Commission to remove the incumbent LECs' incentive to manufacture such claims by imposing on the LECs the duty to conduct any necessary renegotiations.

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In the Matter of	
Petition of MCI for Declaratory Ruling	**CC Docket No. 96-98** **CCBPol 97-4**

COMMENTS OF AT&T CORP.

Pursuant to the Commission's Public Notice of March 14, 1997,[1] AT&T Corp. ("AT&T") respectfully submits these comments on MCI's Petition for Declaratory Ruling. That Petition seeks Commission action regarding the assertions recently made by some incumbent local exchange carriers that they will deny CLECs the nondiscriminatory access to network elements that Section 251(c)(3) of the Act and the Commission's regulations require, on the ground that to provide such access allegedly could implicate the intellectual property rights of third parties.[2]

This is a timely and extremely important proceeding. Section 251(c)(3)'s requirement that new entrants be granted access to incumbent LECs' network elements is critical to the prospects for effectively opening the local exchange to competition. However, several incumbent LECs, particularly those owned by SBC and US West, are now seeking to interpose a potentially fatal barrier to its implementation and to many CLECs' entry strategies.

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[1] See Public Notice, "Pleading Cycle Established for Comments on Petition of MCI for Declaratory Ruling that New Entrants Need Not Obtain Separate License or Right-to-Use Agreements Before Purchasing Unbundled Elements" (DA 97-557) (March 14, 1997).

[2] See Petition of MCI for Declaratory Ruling, CC Docket No. 96-98, CCBPol 97-4 (March 11, 1997).

Those LECs are stating that they will refuse to provide access to some of the most vital network elements -- including the switch, signaling systems, and operations support systems -- unless and until a new entrant negotiates separate agreements with literally dozens of third parties whose intellectual property rights, these LECs vaguely assert, "could" be implicated by such access.

AT&T believes that most of these assertions of potential intellectual property claims are fabrications, for the rights that purchasers of unbundled elements obtain with respect to all or virtually all of those facilities are no different (in any respect material here) from the rights the LECs have previously granted -- without raising any intellectual property claims -- in making those same facilities available to other carriers in the past. But neither AT&T nor anyone else can say for certain that all such claims are necessarily unfounded. That is because SBC, for one, has refused to provide copies of its licensing agreements even while vigorously asserting these claims.

More importantly, however, these LECs' position would be baseless even if some subset of their claims of potential intellectual property violations turned out to be valid. Incumbent LECs are under a statutory and regulatory obligation to provide new entrants with access to their network elements of the same quality and on the same terms that the LECs themselves enjoy. That means that the LECs are required to use their superior bargaining position with these third party vendors and superior access to information about the existing licenses to obtain whatever amendments, if any, to those licenses are necessary in order to enable them to comply with their statutory obligation to provide that nondiscriminatory access.

In AT&T's view, therefore, the focus of the Public Notice is in some respects misplaced. The Public Notice poses several questions regarding whether any contractual or other intellectual property rights may be implicated by access to network elements. The Commission has thus raised questions that it may not be able to answer definitively, and on which its authority may be disputed. Those questions need not be resolved, however, in order to address the problem at issue.

Instead, all that the Commission need do in this proceeding is reaffirm that (1) it is the incumbent LECs' obligation to do whatever is necessary and technically feasible to make their network elements available to CLECs, and (2) just as this obligation may require incumbent LECs to make technical modifications to their networks in order to accommodate multi-carrier access, so too does it require them to negotiate any necessary amendments to existing agreements if they believe those agreements would otherwise preclude them from implementing their statutory obligations. This approach is compelled by the principles and rules set forth in the First Report and Order, and is the most direct way to remove the substantial obstacle to the development of local exchange competition posed by claims like these. It further will eliminate the incentive incumbent LECs currently have to inflate the number of such claims.

BACKGROUND

It is helpful in understanding the issues in this proceeding to review the competitive context in which the LECs' have raised these "intellectual property" claims, and the disingenuous manner in which they have raised them.

These claims are part of a broader resistance effort directed at Section 251(c)(3)'s requirement that incumbent LECs grant their competitors access to their network elements at cost-based rates. That requirement presents the most serious threat to the incumbent LECs' monopolies, for it can allow the development of competitive alternatives to LEC services that can eliminate the LECs' monopoly profits and create lower prices for consumers in the near term. By contrast, the resale provisions, while important for other reasons, have no similar such potential.[3] SBC, for example, has thus stated that "we would rather, first of all, have reseller competitors" than competitors using network elements.[4]

Because of the competitive importance of network elements, incumbent LECs urged the Commission in the comments leading to the First Report and Order to impose a series of

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[3] That is because the setting of the wholesale discount at retail rates minus avoided costs assures that the LECs' net revenues are not diminished and that their existing monopoly profit margins are preserved. Further, pure resellers can offer only the same retail services that LECs offer, and cannot compete in the provision of access services. Thus, while resale will provide a useful "first step" into the market for many CLECs, it does not present the same competitive threat to incumbent LECs as network elements.

[4] See Testimony of Barbara Hunt, Application of AT&T Communications of the Southwest, Inc. for Compulsory Arbitration to Establish an Interconnection Agreement between AT&T and SWBT, Docket No. 16226, Tr. at 4436.

restrictions that would have illegally precluded any effective use of network elements as a competitive alternative and assured that their monopoly profits were protected.[5] After losing on these claims before the Commission, the incumbent LECs then renewed each of them before the Court of Appeals for the Eighth Circuit in their appeal of the First Report and Order.[6] In addition, some LECs have even asked State Commissions arbitrating interconnection agreements and federal district courts hearing Section 252(e)(5) actions, both of which are required to enforce the Commission's regulations (see §§ 252(c)(1), 252(e)(5)), to adopt and enforce the rejected LEC positions instead -- and some State Commissions have done so.[7]

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[5] For example, they asked the Commission to (1) require that network elements be priced not at their economic cost, but to protect existing LEC monopoly profits, See First Report and Order, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98 (rel. Aug. 8, 1996), ¶¶ 665-72 ("First Report and Order"); (2) prohibit the use of cost-based unbundled elements to compete with some of their existing retail services, see id., ¶ 404; (3) authorize them to discriminate in the interfaces with the operations support systems that are essential to the provisioning of network elements, see id., ¶¶ 504-528; and (4) prohibit the use of a combination of all network elements on the ground that it would somehow be equivalent to resale. See id., ¶¶ 317-341.

[6] See Brief for Petitioners Regional Bell Companies and GTE, Iowa Utilities Bd. v. FCC, No. 96-3321 (8th Cir.) (filed Nov. 18, 1996) ("BOC/GTE 8th Circuit Brief").

[7] See, e.g., First Order of Arbitration Awards, ¶¶ 39-41 Interconnection Agreement Negotiation Between AT&T and BellSouth, Docket No. 96-01152 (Tenn. Regulatory Authority, Nov. 25, 1996); Order Ruling on Arbitration, p. 51, Petition of AT&T for Arbitration, Docket No. 6801-U (Georgia PSC, Dec. 4, 1996); Complaint, ¶ 67 et seq., GTE Florida, Inc. v. AT&T Communications of the Southern States, Inc., 4:97CV26MP (U.S.D.C. N.D. Fla., filed February 3, 1997); Complaint, ¶¶ 91-94, U S West Communications, Inc. v. AT&T Communications of the Midwest, Inc., No. 4-97-CV-70082 (U.S.D.C. S.D. Iowa, filed February 7, 1997).

The LEC "intellectual property" claims at issue in this proceeding represent an indirect but no less serious attempt to achieve the same objective of substantially impeding or nullifying CLECs' right of access to network elements. The recent origin of these claims is itself evidence of their lack of merit. To AT&T's knowledge, the proposition that access to network elements might violate the intellectual property rights of third parties was not asserted in any of the State proceedings that addressed unbundling prior to passage of the 1996 Act. Further, as the Commission has noted, that proposition likewise was generally not asserted in the comments leading to the First Report and Order, except by a few incumbent LECs in one "very limited context" (vertical features in the switch).[8] Even in that limited context, the proposition was asserted only in the most vague and general terms, without any precise description of what rights were at issue, whether they actually would be violated, or how they realistically could be violated. Moreover, as the Commission has pointed out, "none of the numerous unregulated parties that filed comments with the Commission complained that unbundling would impair their intellectual property rights."[9]

However, after the First Report and Order was released, the BOCs and GTE raised the issue before the Eighth Circuit in their appeal. As the Commission pointed out in its responsive

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[8] See Brief of the Federal Communications Commission and the United States of America, Iowa Utilities Bd. v. FCC, No. 96-3321 (8th Cir.) (Dec. 23, 1996), p. 98 (citing First Report and Order, ¶ 419) ("FCC Eighth Circuit Brief").

[9] FCC Eighth Circuit Brief, p. 98.

brief, just as the LECs had failed to present any evidence that there would be such impairment to the Commission, the LECs on appeal likewise were unable to identify "a single concrete case" in which unbundling would infringe third party rights -- and, instead, merely made the nebulous assertion that unbundling "could" do so.[10]

Moreover, the sole basis of that statement was their assertions that the Commission's unbundling rules require an incumbent LEC to give competing carriers "control" over network elements that contain the intellectual property of third parties, and that those third parties' rights could therefore be infringed by those rules. These were flat misrepresentations. First, the Commission had repeatedly made clear that CLECs would not be given physical control over the network elements they purchase. See, e.g., First Report and Order, ¶ 258 ("This concept of network elements . . . does not alter the incumbent LEC's physical control"); id., ¶ 415 ("the incumbent LEC is not required to relinquish control over operations of the switch"). Second, even if they had been granted such control or if access to unbundled elements implicated third party intellectual property rights in some other fashion, nothing in the Commission's rules requires that those rights be violated. To the contrary, a LEC could comply with the unbundling rules, and avoid any infringement, by negotiating

[10] See id., p. 99 (citing BOC/GTE Eighth Circuit Brief, p. 63). Remarkably, the LECs in their Reply Brief then misrepresented the Commission's response on this point. They falsely asserted that "[t]here is no dispute that the rules will require LECs to make licensed intellectual property available for entrants . . . ." Reply Brief of the Regional Bell Companies and GTE, Iowa Utilities Bd. v. FCC, No. 96-3321 (8th Cir.) (Jan.6, 1997).

any amendments to its license agreements that it deems necessary to enable it to comply with Section 251(c)(3).

Nonetheless, these intellectual property claims have continued to be made by certain LECs since the briefing of the appeal. AT&T has been confronted with them most directly in its efforts to obtain interconnection agreements with SBC in Texas and elsewhere. SBC has claimed that access to its network elements could implicate the rights of more than 40 third-party vendors with whom it has license agreements, because those agreements (in SBC's carefully worded formulation) do not "expressly authorize" SBC "to give or provide access to the intellectual property to other telephone companies."[11] SBC has not taken a position on whether those rights would in fact be violated by the provision of unbundled elements. But SBC has refused to provide access to its unbundled elements as required by the Act, and has refused even to provide AT&T with the licensing agreements. Instead, it asserts that AT&T and other new entrants must individually contact each of the dozens of vendors SBC asserts may potentially be affected and negotiate their own licenses with these vendors before they may be given access to SBC's network elements. Without licenses, or at least proof that the vendor consents to the CLEC's access to the element in question, SBC will withhold access to that element.[12]

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[11] See Southwestern Bell's Response to AT&T's Motion to Stay and Refer to the FCC, Southwestern Bell Telephone Co. v. AT&T, No. A-97-CA-132-SS (March 31, 1997), p. 5.

[12] Other LECs have likewise sought to press similar claims. See, e.g., U S West proposed contract language, ¶¶ 5.1-5.3, filed with Arizona Corporation Commission.

DISCUSSION

AT&T's discussion of these issues is organized in three parts. Part I explains that, in any instance in which an ILEC contends that its existing licenses would require it to deny access to its unbundled network elements, its obligation under Section 251 of the Act and the Commission's implementing rules is to renegotiate those licenses so as to permit it to comply with its statutory obligation to provide "nondiscriminatory access" -- i.e., access equal in quality to that which the ILEC itself enjoys.

Part II addresses the treatment of these intellectual property claims under Section 253. It explains why any State rule that purports to require new entrants to negotiate their own licenses with the ILECs' vendors as a precondition to obtaining unbundled network elements would violate that provision and be preempted.

Finally, Part III addresses the Commission's inquiries in the Public Notice regarding the possibility that any intellectual property rights might actually be violated by the provision of access to unbundled network elements. It describes the aspects of intellectual property law that render such claims spurious, and identifies the numerous contexts in which ILECs have granted other carriers comparable rights in purchasing the use of the same or similar facilities without raising any such claims -- which strongly suggests that the current round of allegations is based less on any genuine need to protect the intellectual property of others and far more on a desire to impede and delay competitive entry.

I. THE OBLIGATION TO PROVIDE NONDISCRIMINATORY ACCESS TO NETWORK ELEMENTS REQUIRES THAT AN INCUMBENT LEC NEGOTIATE ANY AMENDMENTS TO ITS EXISTING LICENSES THAT IT DEEMS NECESSARY TO PROVIDE SUCH ACCESS.

The issues raised by MCI's petition can and should be resolved by reference to the principles and rules adopted in the First Report and Order. To begin with, with respect to each of the network elements which the Commission ordered to be made available, the Commission expressly found either that the element is not conceivably proprietary, that its unbundling is "necessary" within the meaning of Section 251(d)(2)(A) of the Act, or both.[13] Thus, for any element that might potentially contain proprietary aspects, the Commission has determined that its availability "is a prerequisite for competition" because "without such elements, [CLECs'] ability to compete would be significantly impaired or thwarted."[14]

Under the Act, incumbent LECs must therefore provide CLECs with "nondiscriminatory access" to those elements. See 47 U.S.C. § 251(c)(3). That means that the access received by CLECs, and the element itself, "must be at least equal-in-quality to that

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[13] See First Report and Order, ¶ 388 (loop); id., ¶ 393 (network interface device); id., ¶ 419 (switch); id., ¶ 425 (tandem switch); id., ¶ 446 (interoffice facilities); id., ¶ 481 (signaling links and STPs); id., ¶ 490 (call-related databases); id., ¶¶ 493, 497, 499 (service management system for AIN); id., ¶ 521 (operations support systems); id., ¶ 538 (operator call completion services and directory assistance).

[14] See id., ¶ 282.

which the incumbent LEC provides to itself."[15] Therefore, for example, an ILEC may not now negotiate licenses with its vendors to include provisions that would grant it exclusive rights to embedded intellectual property in a manner that would preclude it from providing nondiscriminatory access to its facilities to new entrants under Section 251(c)(3).

The same principle applies to existing licenses which are claimed to preclude CLEC access. The Commission has held that where nondiscriminatory access can be provided only if the LEC makes certain feasible modifications to its facilities, the LEC must make those modifications.[16] Accordingly, if in a particular instance the incumbent LEC has entered into a contractual or other arrangement that precludes it from providing CLECs with the same quality of access to its facilities that the incumbent LEC itself enjoys, it is the incumbent LEC's obligation to renegotiate that arrangement -- for example, to obtain an amendment to a license -- so that it may comply with its statutory obligations.[17]

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[15] See id., ¶¶ 312, 315. The only exception to this requirement -- obviously inapplicable here -- is in the "rare circumstance[]" that such nondiscriminatory access is not technically feasible to provide. See id., ¶ 313.

[16] See id., ¶ 202 ("[I]ncumbent LEC networks were not designed to accommodate third party interconnection or use of network elements," and "[i]f incumbent LECs were not required, at least to some extent, to adapt their facilities to interconnection or use by other carriers, the purposes of . . . section[] . . . 251(c)(3) would often be frustrated").

[17] There may be instances in which certain features, such as those in the switch, may be available from a vendor but the incumbent LEC has declined to purchase or use them. In those instances, the incumbent LEC is still obligated to negotiate to obtain them for use by the CLEC if the CLEC so requests. See First Report and (continued...)

That duty will not burden ILECs. The Commission's existing pricing principles are fully capable of dealing in a reasonable and nondiscriminatory manner with any costs associated with the necessary license amendments. Any one-time "start up" costs associated with license amendments should be recovered in the same nondiscriminatory, competitively neutral fashion -- from all carriers, including incumbents, on the basis of their relative use of the network -- as other one-time costs associated with fostering competition that will benefit all consumers. In this way, barriers to entry are reduced and each carrier has the same opportunity to recover these costs.

By contrast, it would not be sufficient under Section 251(c)(3) for the incumbent LEC to offer to provide the network element on the condition that the CLEC indemnify it for any resulting liability to the vendor. If a CLEC were required to indemnify the incumbent LEC as a condition of obtaining unbundled elements, and thereby face potential liabilities and costs beyond what the incumbent LEC faces for the use of that same element, it obviously has not received "nondiscriminatory access."

The obligation that the incumbent LEC itself negotiate any necessary license amendments is merely one manifestation of the more general requirement that the incumbent LECs' unique "economies be shared with new entrants."[18] An incumbent LEC may no more

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[17] (...continued)
Order, ¶ 314 (incumbent LECs must provide "access or unbundled elements of higher quality" than that which they provide to themselves "when requested and where technically feasible").

[18] See id., ¶ 11.

consign new entrants to the often infeasible task of negotiating their own licenses than it may require them to build their own facilities. For several reasons, obtaining those licenses would in many instances be exceedingly burdensome for CLECs, and impose a patently discriminatory obligation.

First, new entrants will have no purchasing or bargaining power with the incumbent LECs' vendors remotely comparable to that enjoyed by the incumbent LEC as a result of the volumes of business it controls. These vendors compete vigorously with one another to sell to, and please, their largest customers -- the incumbent LECs -- and have no interest in assisting its potential competitors. Such vendors would likely be subject to implicit or even explicit pressure to make competitive entry more difficult. Smaller entrants in particular would have little to offer in return, and the Commission should ensure that its approach to this issue create workable results not only for AT&T and MCI, but for the numerous smaller CLECs who are presently intending to, or will in the future, enter the local exchange market.

Second, even if the CLECs and the incumbent LECs would otherwise have been in equivalent bargaining positions vis-a-vis a third party vendor at some earlier point in time (as they plainly would not), that will never be the case once the vendor's property has become embedded in the incumbent LEC facilities to which the CLEC needs access. The incumbent LEC will have had a choice of vendors when it first installed the feature, and will have paid a competitive price to the vendor it chose -- while the parallel license the CLEC will be required to obtain will be available only from a specific vendor, and the CLEC will therefore face a monopoly price. New entrants will thus be (at best) subject to economic exploitation as the vendor's captive customer, and (at worst) simply refused a license from vendors that desire to please the incumbent LECs by precluding competition with them.

Third, the ILECs' approach will mean that new entrants would pay a discriminatorily higher price for any intellectual property licenses. First, CLECs would incur significant transaction costs in attempting to obtain licenses from dozens of different vendors as a precondition of entry. Second, CLECs would also then pay higher unit costs for the licenses themselves, because they lack the bargaining position of the ILECs. Indeed, those ILECs that claim that each CLEC must obtain its own right-to-use and other licensing agreements from third party vendors have nonetheless included in their cost studies the license fees and expenses that they incur themselves in obtaining equipment from their vendors.[19] Incumbent LECs would thus have new entrants bear a double burden: first paying a share of the licensing fees incurred by incumbents for their own uses, and then again paying separate and additional amounts directly to the LECs' vendors. In a related context, the Commission had little difficulty concluding that such a result would not be "competitively neutral." Second Report and Order, ¶ 343, Implementation of the Local Competition

[19] For example, in addressing this very issue, SBC has stated that the Texas PUC set unbundled network element prices based on "the costs that Southwestern Bell pays for its own uses." Southwestern Bell's Response to AT&T's Motion to Stay and Refer to the FCC, p. 8, SBC v. AT&T Communications of the Southwest, Inc., Civ. Act. No. A 97 CA 132 SS (U.S.D.C. W. D. Tex., filed March 31, 1997).

Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98 (rel. Aug. 8, 1996).

Fourth, the incumbent LECs will always have far superior access to the information necessary to negotiate any license amendments. Unlike the CLECs, the incumbent LECs know the nature of their facilities and the scope of any existing licenses. They are in the best position to determine whether any amendments are necessary and what those amendments should be. Indeed, the wide disparity between the information available to incumbent LECs and that available to CLECs is starkly illustrated by the situation in Texas. SBC has there refused to share its license agreements with AT&T or state whether any intellectual property rights would actually be infringed through the provision of unbundled elements, but has told AT&T that AT&T must, without any of this information, approach each of 42 vendors, somehow find out whether their rights would be violated, and proceed to work out whatever agreements are necessary. That could be an impossible situation for new entrants, and SBC knows it.

The discrimination entailed by any requirement that a CLEC separately obtain its own licenses would thus by no means be limited to the price differential such entrants would pay vendors when compared to the incumbents. The delays and other burdens such a scheme would impose would be at least as substantial and anticompetitive in their effect. Without access to the specific licenses, and without knowledge of the particular inventions or software to which patents or copyright claims pertain, it would take substantial time just for new entrants to assess whether any amendments or new licenses would be necessary. Obviously, this approach could delay entry by months, if not years. By contrast, incumbents could evaluate such issues in far less time, so long as they had the incentive to do so.

The overriding reality is that, as the Commission has recognized, "incumbent LECs have little incentive to facilitate the ability of new entrants . . . to compete against them and, thus, have little incentive to provision unbundled elements in a manner that would provide efficient competitors with a meaningful opportunity to compete."[20] Indeed, to the contrary, "incumbent LECs have the incentive and the ability to engage in many kinds of discrimination."[21] The incumbent LECs therefore have every incentive to "construe" their existing contractual arrangements to preclude providing nondiscriminatory access to their competitors, and to craft future such agreements to do so expressly. That is why the only rule that can protect the Act's and the Commission's pro-competitive objectives is one that focuses on eliminating those perverse incentives -- by making clear that the responsibility for obtaining agreements with vendors that will permit nondiscriminatory access rests with the incumbent LEC, and cannot be shifted to CLECs.

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[20] First Report and Order, ¶ 307.

[21] See id.

II. FOR ALL OF THE SAME REASONS, ANY STATE-IMPOSED REQUIREMENT THAT A NEW ENTRANT SEPARATELY OBTAIN ITS OWN LICENSES BEFORE OBTAINING ACCESS IS A BARRIER TO ENTRY AND IS THUS PREEMPTED UNDER SECTION 253.

Section 253 expressly provides that "[n]o State or local statute or regulation or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." 47 U.S.C. § 253(a) (emphasis added). The Commission is explicitly authorized to "preempt the enforcement of [any] such statute, regulation, or legal requirement." 47 U.S.C. § 253(d).

Any requirement whose effect would be to delay entry and to increase the costs of obtaining access in a manner that discriminates against new entrants and in favor of incumbents creates a barrier to entry. Because these are the clear effects of obligating CLECs separately to negotiate their own individual licenses with each of the incumbents' vendors, see supra pp. 13-16, the Commission should preempt any state arbitration order or approved SGAT which imposes that legal requirement.

The costs of obtaining licenses that enable an ILEC to provide nondiscriminatory access are simply one of the costs that must be incurred to enable the ILECs' network to function in a multi-carrier environment. The proper treatment of such expenses is to ensure that the share of such costs borne by each carrier does not affect significantly any carrier's ability to compete with other carriers, and the only way to assure that result is to require that such costs be borne equally by all carriers, including the incumbent. Here, the only resolution that achieves that result is one which imposes on the incumbent the obligation to negotiate all licenses, including any necessary renegotiations, so as to permit it to comply with its access obligations, and then spreading the fees and other costs of such licenses among all carriers, including the incumbent, on a proportionate basis. By contrast, imposing the costs and burdens exclusively on new entrants would serve as a powerful and unlawful impediment to competitive entry.

III. ALTHOUGH THE COMMISSION NEED NOT RESOLVE THE ISSUE, MOST IF NOT ALL OF THE LECS' INTELLECTUAL PROPERTY CONCERNS ARE LIKELY FABRICATIONS.

As discussed above, there is no need for the Commission or any CLEC to assess with certainty the ultimate validity or scope of the incumbent LECs' purported intellectual property concerns in order to determine what the incumbent LECs' obligations are in any situation in which such claims might validly arise. Nevertheless, there is every reason to suspect that the claims that intellectual property rights of third party vendors would be violated if these LECs were to comply with their duty to provide nondiscriminatory access to unbundled network elements are either complete fabrications or, at a minimum, substantially overblown.

The basis for this skepticism is twofold. First, the substantive doctrines of patent and copyright law make it unlikely that the LECs' vendors could assert valid claims against CLECs who obtain access to network elements. Second, LECs have for many years provided customers with access to virtually all of the network elements -- on a stand-alone basis and with no less "control" than would be exercised by a CLEC obtaining access under § 251(c)(3) -- without once claiming that providing such access to their customers violated any of their vendors' intellectual property rights. This fact substantially undermines their claim that they cannot now provide the same degree of access to their competitors. Together, these considerations strongly confirm that the intellectual property claims now raised by some incumbents are a tactical move designed to delay, and possibly obstruct altogether, the ability of competitors to enter the market through the purchase of unbundled network elements.

A. These Intellectual Property Claims Are Likely To Be Meritless As A Matter Of Law.

It is a well-settled principle of patent law that "[t]he patent owner's rights with respect to the product end with its sale, United States v. Univis Lens Co., 316 U.S. 241, 252 (1942), and a purchaser of such a product may use or resell the product free of the patent, id. at 250." Intel Corp. v. ULSI System Technology, 995 F.2d 1566, 1568 (Fed. Cir. 1993) (emphasis added). "Such further use and sale of a patented product is beyond the reach of the patent statutes under Univis Lens." Harmon, Patents and the Federal Circuit, § 6.2(c) at 210 (3d edition, 1994). Thus, when a LEC purchases a patented product from one of its vendors, that purchase will, absent unusual circumstances, exhaust the vendor's patent rights in the product, and the LEC may use or resell that product as it wishes. If the patent exhaustion doctrine would permit the LECs to resell outright any patented piece of equipment it had purchased from one of its vendors, the LEC may a fortiori allow its competitors access to such equipment free of any fear of prosecution by the patent holder. This doctrine should dispose of virtually all of the LECs' patent concerns.

The scope of the protections afforded software by the copyright laws similarly makes it unlikely that third party vendors would be able to raise meritorious claims in the event that a LEC provided access to network elements, such as switches, that had embedded within them protected software. The copyright laws prohibit the copying, distribution, publication, or preparation of derivative works based on, a copyrighted product. 17 U.S.C. § 106. Because a CLEC would not generally engage in copying or distribution when it provided service through unbundled elements, it seems highly unlikely that the copyright laws would place any obstacle before a LECs' compliance with its duties to provide access to its network on an unbundled basis.

In short, the patent exhaustion doctrine, as well as the limited scope of the copyright laws, together make it quite unlikely that any of the LECs' equipment vendors would possess any intellectual property rights that would survive the sale of their equipment and that would limit access to such equipment, including any embedded software, by a LECs' competitors.

B. The LECs' Conduct in Connection with Other Offerings Provides Particular Grounds for Skepticism About their Intellectual Property Claims.

As noted above (see supra p. 7), the incumbent LECs' appeal on this issue in the Eighth Circuit was premised on the false statement that access to networks elements would give a CLEC physical control over the element. But see First Report and Order, ¶¶ 258 (expressly stating that the incumbent LEC retains "physical